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Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

JOSEPH DISTEFANO, TRUSTEE
Petitioner

v.

KATHERINE DONOVAN, ET AL. AS THEY ARE THE COMMISSIONERS OF ESSEX COUNTY, BEDAR & ASSOCIATES, ARCHITECTS, INC., ET AL.
Respondents

Petition for A Writ of Certiorari To The Supreme Judicial Court of The Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

Nicholas J. Decoulos
BBO #117760
DECOULOS & DECOULOS
248 Andover Street
Peabody, MA 01960
Tel. (508) 532-1020
Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the Jury Commissioner improperly administered the system by which juror pools were assembled in Essex County, when it allowed prospective jurors to unilaterally excuse themselves from performing their duties in a particular court because of an alleged "extreme transportation problem", without any monitoring or oversight by the Jury Commissioner, which resulted in a juror pool which did not geographically represent the judicial district.

TABLE OF AUTHORITIES

Cases

City of Cleveland v. The Cleveland Electric Illuminating Company, 538 F.Supp. 1240 (1980) 19

Thiel v. Southern Pacific Co., 328 U.S. 211, 220 (1945) 13,17

U.S. v. Armsbury, (1976, DC OR) 408 F.Supp. 1130 15

U.S. v. Young, 822 F.2d 1234 (2nd Cir. 1987) 19

Other Authorities

28 U.S.C. § 1257 3

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Petition for A Writ of Certiorari To The Supreme Judicial Court of The Commonwealth of Massachusetts

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Joseph Distefano as he is Trustee of the First Avenue Realty Trust, respectfully prays that a writ of

certiorari issue to review the order and memorandum of the Appeals Court of the Commonwealth of Massachusetts entered October 26, 1994, and the denial of his application for further appellate review by the Supreme Judicial Court of the Commonwealth of Massachusetts.

OPINIONS BELOW

On October 16, 1990, the Superior Court denied the plaintiff's motion to challenge the composition of the juror pool. A transcript of the proceedings is at App. 25-34.

The Massachusetts Appeals Court affirmed the denial of the plaintiff's

motion to challenge, which is unreported but is set forth at App. 42-45.

The Supreme Judicial Court's order denying review is unreported but is set forth at App. 46.

JURISDICTION

The jurisdiction of this Court to review the order of the Supreme Judicial Court for the Commonwealth of Massachusetts dated January 4, 1995, denying the petitioner's Petition for Further Appellate Review, is invoked under 28 U.S.C. § 1257, which provides as follows:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

> Court by a writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States...."

CONSTITUTIONAL PROVISION AND STATUTES

The Seventh Amendment of the United States Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The General Laws of Massachusetts, Chapter 234A, Sections 1-80, in particular Sections 73 and 74, which provide as follows:

> **§73. Challenge to Composition of Juror Pool; Requirements for Challenge; Trial and Decision by Court.**
>
> A party may challenge the composition of the juror pool by a motion for appropriate relief. This challenge shall be made and decided before any individual juror is examined, unless the court orders otherwise. The challenge shall be in writing, supported by affidavit, and shall specify the facts and demographic data constituting the ground of the challenge. The challenge shall be tried by the court and may, within the discretion of the court, be decided on the basis of the affidavits filed with the challenge. Upon the trial of such a challenge, witnesses may be examined on oath by the court and may be so examined by either party. If the challenge is sustained, the court shall discharge the entire juror pool.

§74. Irregularity or Procedural Defect Under this Chapter as Not Justifying Mistrial or Setting Aside of Verdict, Absent Contemporaneous Objection and Prejudice to Objecting Party.

Any irregularity in compiling any list of jurors or prospective jurors; or any irregularity in qualifying, selecting, summoning, confirming, postponing, excusing, cancelling, instructing impanelling, challenging, discharging, or managing jurors; or any irregularity in limiting any term of juror service, in length or other incident of the term; or the fact that a juror shall be found to be not qualified under section four of this chapter; or any defect in any procedure performed under this chapter shall not be sufficient to cause a mistrial or to set aside a verdict unless objection to such irregularity or defect has been made as soon as possible after its discovery or after it should have been discovered and unless the objecting party has been specially injured or prejudiced thereby.

STATEMENT OF THE CASE

The Petitioner was the owner of a parcel of land which was improved with a building thereon. The surface drainage of the Petitioner's property flowed towards and directly into Proctor Brook, which brook flowed through land owned by the Respondent, County.

The County, in improving its property to construct a court house thereon, raised the elevation of its property and as a result, the Petitioner was deprived of the drainage of his property directly to the open Proctor Brook.

The County, in attempting to drain water off the Petitioner's land because of the impediment created to the drainage by

the County's activities, installed a catch basin on its property and immediately adjacent to the boundary line of the Petitioner. The catch basin did not function as designed by the Respondent, Bedar & Associates Architects, Inc., who were retained by the County, and as a result thereof, the Petitioner's property was flooded and his building severely damaged when the newly installed culverts were surcharged and there was a resurgence of the water onto the Petitioner's property by a geyser-like flow through the previously mentioned catch basin.

The Petitioner claimed damages and requested that the Respondent be ordered

to alter the manner in which it was draining its property.

Prior to the sitting of the jury, the Petitioner filed a motion and affidavit pursuant to c. 234A, §73 and §74, claiming that the juror pool did not geographically represent the judicial district in which the trial was being held because of the manner in which the Court was administering the statute (App. 9).

Any prospective juror was allowed the right, without any monitoring by the Jury Commissioner, to claim an "extreme transportation problem" when completing the Juror Confirmation Form (App. 23) and could select a more conveniently located courthouse to which the juror would report

and serve as a juror. The frequent exercise of this option by prospective jurors resulted in a systematic geographical misrepresentation in the juror pool for the entire judicial district.

Prior to the trial the Petitioner's attorney corresponded with the Jury Commissioner, who was appointed pursuant to General Laws, c. 234A. The Jury Commissioner in a reply dated May 8, 1990, (App. 13), stated that in the Lawrence Superior Court, where the Petitioner's trial was held, that 76% of the juror pool consisted of jurors from cities and towns which contained only 24% of the population of the entire County of Essex. The three

towns are Methuen, Andover, and North Andover which abut the City of Lawrence where the Superior Court was sitting.

The composition of the juror pool at the Petitioner's trial was strikingly similar, because 75% of the jurors were from the four cities and towns as outlined in the Jury Commissioner's letter (App. 13).

Subsequent to the Petitioner's trial the Jury Commissioner amended the Juror Confirmation Form (App. 3) by deleting the reason of "extreme transportation problem" to request to change the court location to which the prospective juror was assigned. The revised form requires an explanation of the hardship claimed by a prospective

juror. All transfer requests are now scrutinized by the Jury Commissioner's office and a determination is made whether the transfer request is justifiable. (See Invalid Transfer Notice, App. 40.)

The Petitioner's motion was denied by the trial justice and the jury returned a verdict for the Respondents.

REASONS FOR GRANTING THE WRIT

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith v. Texas*, 311 U.S. 128, 130; *Glasser v. United States*, 315 U.S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical

groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers. This discretion, of course, must be guided by pertinent statutory provisions. Thiel v. Southern Pacific Co., 328 U.S. 211, 220 (1945).

The undisputed evidence demonstrates a systematic assault by potential jurors on the jury system. There was an

acquiescence to this assault by the Jury Commissioner's Office by their failure to monitor the transfer request as is now being done.

The statistics relating to the representation of the cities and towns contained in the Petitioner's motion are almost identical to the statistics supplied to the Petitioner's attorney in the correspondence dated May 8, 1990 (App. 13) The Petitioner's motion reflects that 27 of the 36 persons in the juror pool resided in the northern portion of Essex County, or on a percentage basis, 75%. That statistic is within one percent of the same statistic that was stated in

the Jury Commissioner's letter over a three month period. (App. 13)

No juror should be allowed to select the court location where the juror will serve, without proper supervision and monitoring from court officials. Jury service is an obligation of every citizen and cannot be shirked on a plea of inconvenience, without ample and truthful justification reviewed by court officials administering the system.

In challenging the process of jury selection the Petitioner "need not prove purposeful discrimination in selecting a qualified jury pool." U.S. v. Armsbury, (1976, DC OR) 408 F.Supp. 1130.

The court officials should be required to review the request and determine if there is a hardship. The carte blanche approval violates the Constitutional rights of the litigants and makes the jury system act in a crazy quilt fashion.

It has been repeatedly stated by this Court when referring to the right of a trial by jury, that the jury should be selected at random and drawn from a fair cross-section of the community. As a result of the Jury Commissioner allowing potential jurors to select the most convenient court location for jury service, the jury became a demographic group from only the cities and towns which

consisted of only 24% of the population of the entire judicial district.

In the case of Thiel v. Southern Pacific Co., supra, 224, the Court stated that despite the best of intentions and motives, the plaintiff was deprived of a jury of his peers. In that case the court officials excluded from the jury list all persons who worked for a daily wage.

> That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.... The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen.

There must be a proportionate representation of the political subdivisions making up the juror pool for the entire county. In the case before this Court, the court officials hopelessly failed and admitted their failure by subsequently revising the juror confirmation form so that there now exists an equal representation both as to the geography and the demography of the judicial district.

The Petitioner, having complied with the statutory requirements of c. 234, §73 and §74, and bringing to the Court's attention the geographical discrimination of the juror pool prior to the commencement of the trial, should be

allowed a new trial in order that his claim be presented to a jury of his peers.

It is never too late to raise a constitutional challenge to the makeup of the juror pool. See U.S. v Young, 822 F.2d 1234 (2nd Cir. 1987). "Although it bars them from statutory relief, defendants' failure to comply with the provisions of the Jury Selection Act does not preclude them from raising a constitutional challenge to the makeup of the venire, based on the sixth amendment."

In the case of City of Cleveland v. The Cleveland Electric Illuminating Company, 538 F.Supp. 1240 (1980), wherein it was stated: "It is, of course, firmly established that the trial court is vested

with broad discretion in determining the sufficiency of challenges to prospective jurors." The Court went on to say at 1256:

> In the exercise of its discretion (it) is persuaded that the interests of justice will be best served by individually assessing the veniremen's respective claims of personal hardship in determining whether the exclusion of particular members of the jury panel is in fact warranted. The Court would observe in this regard that the statutory language of 28 U.S.C. § 1866(c), which confers upon the district court the power to excuse 'any person summoned for jury service... upon a *showing* of undue hardship or extreme inconvenience', id., (emphasis supplied), implicitly authorizes the trial court to make inquiry of the prospective jurors for the purpose of satisfying itself that a genuine basis for the asserted hardship does indeed exist

The Petitioner waited more than eight (8) years for his jury trial and should

not be deprived of a jury of his peers because of the lackadaisical approach by court officials in the performance of their sworn duties.

CONCLUSION

For all of the reasons presented herein, this Petition for Writ of Certiorari should be granted.

The decisions of the Superior Court, the Appeals Court, and the Supreme Judicial Court for the Commonwealth of Massachusetts are in error, do not comply with the Seventh Amendment of the United

States Constitution, and are in direct conflict with the decisions of this Court.

Respectfully submitted:

Nicholas J. Decoulos
BBO #117760
DECOULOS & DECOULOS
Attorney for Petitioner
248 Andover Street
Peabody, MA 01960
Tel. (508) 532-1020

APPENDIX

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT
NO. 81-2484

JOSEPH DISTEFANO AS HE IS TRUSTEE
OF THE FIRST AVENUE REALTY TRUST

v. COMPLAINT

KATHERINE DONOVAN, EDWARD H. CAHILL
AND JOHN W. McKEAN AS THEY ARE THE
COMMISSIONERS OF ESSEX COUNTY,
BEDAR & ASSOCIATES, ARCHITECTS, INC.
AND RUDOLPH BEDAR

Parties

1. The plaintiff, Joseph Distefano as he is Trustee of the First Avenue Realty Trust, resides at 421 Lowell Street, Lynnfield, Essex County, Massachusetts.

2. The defendants, Katherine Donovan, Edward H. Cahill and John W. McKean, are

the duly elected County Commissioners of Essex County (Commissioners).

3. The defendant, Bedar Associates, Architects, Inc., is corporation duly organized and existing and having an usual place of business at 345 Boylston Street, Newton, Massachusetts (Corporation).

4. The defendant, Rudolph Bedar, has an usual place of business at 345 Boylston Street, Newton, Massachusetts. (Bedar).

Allegations of Fact

5. The plaintiff is the owner of a parcel of property located in Peabody in the County of Essex and commonly referred to as 29 Lowell Street.

6. The defendant, Commissioners, is the owner of a parcel of property located in

said Peabody at Peabody Square and bounds on Central Street and Railroad Avenue and abuts the property owned by the plaintiff.

7. The defendant, Commissioners, in performing their duties caused to be taken by eminent domain the parcel of property which they now own.

8. At the time of the taking of the property by the Commissioners, the topography of the land was of such a nature that caused surface drainage to flow directly into Proctor Brook.

9. After the taking of the property by the Commissioners, the Commissioners caused to be retained the services of the defendants, Corporation and Bedar, said Bedar being a registered architect, for

the purpose of engaging the services of the defendants, Corporation and Bedar, to cause a set of plans to be drawn for the erection of the building known as the District Court of Peabody.

10. The defendants, Corporation and Bedar, knew or should have known that the area where the courthouse building was to be located was subject to flooding; and that the adjacent land, including that of the plaintiff, had need for the direct drainage into Goldthwaite and Proctor Brooks.

11. Pursuant to the plan devised by the defendants, Corporation and Bedar, and approved by the defendant, Commissioners, the topography of the land owned by the

Commissioners was changed and the brooks which had been open became enclosed in conduits. The topography of the land owned by the defendant, Commissioners, was raised and as a result thereof, the plaintiff's land lost the direct access to the open brooks.

12. All of the defendants in pursuing their plan for the erection of the courthouse building caused a drainage catch basin to be placed immediately adjacent to the plaintiff's property for the purpose of channeling surface water off the plaintiff's land into Goldthwaite Brook and Proctor Brook.

Cause of Action

1. The manner in which the topography of the property was changed, the deprivation of the plaintiff's direct access to the open brooks, and the installation of a surface drainage catch basin has deprived the plaintiff of being able to drain surface water off his property and as a result thereof has caused flooding of the plaintiff's property and buildings to the damage of the plaintiff.

2. As a result of the manner in which the defendants altered the topography of the property, on January 29, 1979, the surface water could not drain off the property of the plaintiff and therefore flooded the property of the plaintiff and

caused severe damage to the plaintiff's building located on his property.

Wherefore, the plaintiff demands:

1. Judgment against the defendants in the sum of $50,000.00 with interest and costs.

2. That the defendant, Commissioners, be ordered to cause the drainage system to be altered a in manner which will not cause any damage to the plaintiff's property.

NICHOLAS J. DECOULOS
Attorney for Plaintiff(s)
248 Andover Street
Peabody, MA 01960
Tel. (617) 532-1020
Dated: November 17, 1981

App. 8

DEMAND FOR JURY TRIAL

The plaintiff demands a trial by jury on all issues.

NICHOLAS J. DECOULOS
Attorney for Plaintiff(s)
248 Andover Street
Peabody, MA 01960
Tel. (617) 532-1020
Dated: November 17, 1981

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT
NO. 81-2484

JOSEPH DISTEFANO AS HE IS TRUSTEE
OF THE FIRST AVENUE REALTY TRUST

v.

KATHERINE DONOVAN, EDWARD H. CAHILL
AND JOHN W. McKEAN AS THEY ARE THE
COMMISSIONERS OF ESSEX COUNTY,
BEDAR & ASSOCIATES, ARCHITECTS, INC.
AND RUDOLPH BEDAR

PLAINTIFF'S MOTION AND AFFIDAVIT TO CHALLENGE COMPOSITION OF THE JUROR POOL

The Plaintiff pursuant to General Laws Chapter 234A, Section 73, moves that the Court dismiss the juror pool.

In support of the allowance of this motion the Plaintiff states that the juror pool is not composed of members that

represent the judicial district as required by General Laws Chapter 234A, Section 34. In order that the Plaintiff be allowed to prove his contention, it is necessary that he be allowed to review the juror pool and examine the jurors as allowed by Section 73.

Furthermore, the Essex County juror pool sitting in Lawrence on this day, October 16, 1990, consists of 36 persons, 27 of whom live in the northern portion of Essex County, to wit: Andover, North Andover, Methuen and Lawrence, and the balance live in the remaining cities and towns.

Furthermore, the Plaintiff submits a copy of a letter dated May 8, 1990, which

sets forth the manner in which jurors are selected. The percentage of the jurors sitting in Lawrence for the first three months of 1990 reflects that 76% of the jurors come from Lawrence, Methuen, Andover and No. Andover, and that 24% come from other cities and towns in Essex County.

Attached hereto and made a part of this motion is a list of the cities and towns located in Essex County, together with their respective populations for the years 1980, 1987 and 1989. The Plaintiff has added to that list the percentage of the population of each city and town in relation to the total population. The

aggregate population of Andover, Lawrence, Methuen and North Andover is 24%.

For the purpose of this motion, it is respectfully submitted to the Court that the juror pool before the Court does not represent a geographical cross-section of the judicial district as required by General Laws Chapter 235.

Signed under the penalties of perjury this 16th day of October, 1990.

Nicholas J. Decoulos
DECOULOS & DECOULOS
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248 Andover Street
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Tel. (508) 532-1020
BBO #117760

App. 13

OFFICE OF THE JURY COMMISSIONER

98 North Washington Street
Boston, Massachusetts 02114
(617) 723-7433
Jury Commissioner - Paul J. Carr

May 8, 1990

Nicholas J. Decoulos, Esquire
Decoulos & Decoulos
248 Andover Street at Willowdale Lane
Peabody, Massachusetts 01960

Dear Attorney Decoulos:

This letter is in response to your letters of January 17 and April 25, 1990, in which you address specific concerns pertaining to the "manner in which Chapter 234A is being administered."

I do not disagree with your "duty to advise the judge, as an officer of the court, as to any problem of a discriminatory jury selection." However, I can assure you that since January 1, 1984, the time at which all jurors serving

the Trial Courts of Essex County began to be selected in accordance with the provisions of Chapter 234A, no such discriminatory jury selection has occurred as the result of the Office of the Jury Commissioner's administration of the jury system.

The following is a brief overview of how jury selection occurs in Essex County as mandated by the provisions of Ch. 234A:

1. Each year, the Office of the Jury Commissioner receives a new listing of all residents seventeen years of age or older from the thirty-three cities and towns in Essex County. Each resident on a city or town list is assigned a sequentially listed number, starting with the number one, and continuing through to the last resident on the list.

2. This year 40% of each city and town's adult population was selected in order to create a 1990 Master Jury List (MJL) for Essex County. For each city or town, our computer used its automated random number generator to create a 40% listing of random numbers for each city or town. A city's or a town's total population was used as the base figure, and 40% of that number was used as the basis for generating the random numbers.

3. Once the random numbers were generated, the computer simply matched the random numbers to the sequentially listed numbers submitted by the city or town and "selected" those residents from the list to become part of Essex County's 1990 Master Juror List.

4. By using this method, every adult resident of Essex County had an equal opportunity of being selected as a prospective juror. In other words, when this was done in 1989, all persons over the age of seventeen years were given an equal opportunity of being part of the 40% of the total that was chosen to make up the 1990 MJL for Essex County.

By adhering to the above-mentioned process, it all but guarantees that the Master Juror List is a true representation of the community, or county, from which the jurors were drawn.

This was not always the case. Prior to 1984, jurors in Essex County were selected by local city and town officials by a process that allowed discretionary decisions to play a major part. There also existed thirty-nine statutory exemptions from the duty of having to perform juror service. As a result, the jury pools in Essex County consisted for

the most part of blue-collar workers, senior citizens and homemakers.

It was rare indeed to see doctors, lawyers, nurses, policemen, firemen, school teachers, mothers of small children, students, priests or nuns performing juror service. Given the situation as it existed, I must disagree with your statement: "Prior to the assignment of Essex County to come within the provisions of Chapter 234A, the juror pools in Essex County were far more representative of the entire County than at the present time."

With the enactment of Ch. 234A, class exemptions were eliminated: "no person shall be exempted or excluded from serving as a grand or trial juror because of race, color, religion, sex, national origin, economic status, or occupation." This was in keeping with the primary purpose of Ch. 234A which was to give every citizen the opportunity to serve as a grand or trial juror.

But Ch. 234A does far more than provide for the random selection of citizens from their communities in order to provide an equal opportunity for all to serve as jurors. It also contains many provisions which alleviate hardships that jurors might face as a result of their

having to perform juror service. These legislatively-approved steps were intended solely to provide for public convenience.

One such provision is that which permits a juror, once summoned to serve at a different court within the same judicial district "upon a finding that a hardship will be imposed upon the juror if he were required to serve at the original location." A juror claims such hardship at the time of summoning when he or she declares under penalty of perjury that "I have an extreme transportation problem. Because of this problem, I elect to change my court location..."

Given that Essex County is geographically widespread, this "tool" is used by jurors who reside in the remote corners of the judicial district to allow them to serve at Court locations closer to their homes. The following table represents juror service at the Lawrence Superior Courthouse for the first three months of 1990, and reflects the operation of this provision:

TOWN	TOTAL SCHEDULED	PERCENT OF TOTAL SCHEDULED
AMESBURY	19	1
ANDOVER	268	12

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TOWN	TOTAL SCHEDULED	PERCENT OF TOTAL SCHEDULED
BEVERLY	26	1
BOXFORD	18	1
DANVERS	27	1
ESSEX	5	.5
GEORGETOWN	13	1
GLOUCESTER	23	1
GROVELAND	7	.5
HAMILTON	15	1
HAVERHILL	99	4
IPSWICH	16	1
LAWRENCE	625	28
LYNN	42	2
LYNNFIELD	19	1
MANCHESTER	6	.5
MARBLEHEAD	24	1
MERRIMAC	8	.5
METHUEN	552	25
MIDDLETON	9	.5
NAHANT	9	.5
NEWURY	7	.5
NEWBURYPORT	13	1
NORTH ANDOVER	238	11
PEABODY	46	2
ROCKPORT	6	.5
ROWLEY	8	.5
SALEM	25	1
SALISBURY	9	.5
SAUGUS	18	1
SWAMPSCOTT	7	.5
TOPSFIELD	8	.5

TOWN	TOTAL SCHEDULED	PERCENT OF TOTAL SCHEDULED
WENHAM	5	.5
WEST NEWBURY	10	.5
	2,230	

As you can see, jurors residing in the towns of Lawrence, Methuen, Andover, and North Andover were scheduled to appear more frequently at the Lawrence Superior Courthouse than were jurors from other cities and towns in the County during the first three months of 1990. However, as you can also see, jurors from all cities and towns in Essex County were in fact, scheduled to appear the Lawrence Courthouse during the same time period.

Stated otherwise:

1. 76% of the jurors come from Lawrence, Methuen, Andover and North Andover;

2. 24% of the jurors come from all other cities and towns in Essex County.

Every citizen of the County had an equal opportunity of being selected as part of the 1990 Master Juror List for Essex County. As such, the List represents the best random selection process available anywhere in the nation.

The List is a true cross-section of the population of the judicial district, that is, Essex County, taken as a whole.

As we have been operating the new jury system in Essex County for six years and five months, without any serious problems arising, I do not foresee your concern with the "opening of floodgates as it relates to motions to have the jury pool dismissed" as being a major one at this time.

If you have any questions concerning this matter, please do not hesitate to call me at (617) 723-7433 and I will be more than happy to answer them for you.

Sincerely,

Paul J. Carr
Jury Commissioner

/epr

cc: Chief Justice Robert L. Steadman
Justice John T. Ronan
Jury Management Advisory Committee
File

Essex County Household Data 1980-1989

Community	1980 Population	1987 Population	1989 Population	Percent	
Amesbury	13,971	14,902	15,135	.0231	
Andover	26,370	26,907	27,154	.0453	5%
Beverly	37,655	38,513	38,728	.0592	
Boxford	5,374	5,505	5,535	.0084	
Danvers	24,100	24,641	24,776	.0379	
Essex	2,998	3,070	3,088	.0047	
Georgetown	5,687	5,822	5,856	.0089	
Gloucester	27,768	28,426	28,589	.0437	
Groveland	5,040	5,160	5,190	.0079	
Hamilton	6,960	7,122	7,163	.0109	
Haverhill	46,865	47,946	48,216	.0737	
Ipswich	11,158	11,420	11,486	.0175	10%
Lawrence	63,175	64,659	65,030	.0994	
Lynn	78,471	80,306	80,765	.1235	
Lynnfield	11,267	11,537	11,605	.0177	
Manchester	5,424	5,550	5,582	.0085	
Marblehead	20,126	20,601	20,720	.0316	
Merrimac	4,451	4,557	4,584	.0070	
Methuen	36,701	37,561	37,776	.0577	6%
Middleton	4,135	4,233	4,258	.0065	
Nahant	3,947	4,037	4,060	.0062	
Newbury	4,529	4,839	4,917	.0075	
Newb'port	15,900	16,264	16,355	.0250	
No Andover	20,129	20,576	20,688	.0316	3%
Peabody	45,976	47,065	47,337	.0724	
Rockport	6,345	6,493	6,530	.0099	
Rowley	3,867	4,127	4,192	.0064	
Salem	38,376	39,160	39,381	.0602	
Salisbury	5,973	6,378	6,479	0099	

Saugus	24,746	25,331	25,447	.0389
Swampscott	13,837	14,162	14,243	.0217
Topsfield	5,709	5,846	5,880	.0089
Wenham	3,897	3,969	3,987	.0060
W. Newbury	2,861	2,929	2,946	.0045
Essex County	633,688	649,703	653,708	100.22%

JUROR CONFIRMATION FORM

Please read the reverse side of this form and then answer the question A or B below by placing an X in the appropriate box.

A	I am qualified to serve as a juror.	**B**	I am **not qualified** to serve as a juror. The number of the reason from the reverse side of this form that applies to me is X'd here

C If you claim one of the disqualifications, explain here. Include all necessary facts such as alien registration number, new address, age, date of prior service, etc. If you have claimed Reason 9 or 10, you must attach a letter from your physician or Christian Science practitioner. If you do not provide the facts, this form will be returned to you.

D HAVEHLL PEABODY LAWRENCE NWBPORT SALEM-S

I have an extreme transportation problem. Because of this problem, I elect to change my court location to the court listed above by X'ing the appropriate box to the left of the court.

E I am qualified as a juror, but I wish to postpone to another time, for up to, but not more than one year. Insert the new date as Month, Day, Year. For example May 1, 1988 is written as 050188. Please write your numbers like this 1 2 3 4 5 6 7 8 9 0

F
Explanation of hardship in support of request for court location change.

G
I certify under penalty of perjury that the information provided herein is true and complete to the best of my knowledge.

Date Signature of Juror or Person Authorized to sign

PLEASE READ THE REVERSE SIDE OF THIS FORM.
PLEASE ANSWER ALL QUESTIONS, MARKING THE BOXES WITH A FULL X OR NUMBER, WHICHEVER IS APPROPRIATE.
PLEASE SIGN THIS FORM, TEAR IT ON THE PERFORATION AND RETURN IT IN THE ENVELOPE PROVIDED.
MESSAGE: APPROPRIATE DRESS IS REQUESTED.
CALL US AT 1-800-843-5879 DURING BUSINESS HOURS IF YOU REQUIRE ASSISTANCE.
WE ARE CLOSED ON WEEKENDS AND HOLIDAYS.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT
NO. 81-2484

JOSEPH DISTEFANO AS HE IS TRUSTEE
OF THE FIRST AVENUE REALTY TRUST

v.

KATHERINE DONOVAN, EDWARD H. CAHILL
AND JOHN W. McKEAN AS THEY ARE THE
COMMISSIONERS OF ESSEX COUNTY,
BEDAR & ASSOCIATES, ARCHITECTS, INC.
AND RUDOLPH BEDAR

TRANSCRIPT OF PROCEEDINGS
REGARDING PLAINTIFF'S MOTION TO CHALLENGE
COMPOSITION OF THE JUROR POOL

October 16, 1990

MR. DECOULOS: If your Honor please, on that preliminary matter we talked about on the plaintiff's motion and upon affidavit to challenge the composition of the jury pool, it is an allegation in this motion that the jury pool is not composed of jury members that represent the district required under General Laws Chapter 234A, Section 13.

THE COURT: Go ahead.

MR. DECOULOS: What I would like to have is the juror's questionnaire attached to the motion so it can be part of the motion as an exhibit.

THE COURT: I will after you have used it and impaneled the jury, then you

may staple that together and mark it as Exhibit A on your motion.

MR. DECOULOS: Thank you.

THE COURT: We will record it at that time for identification, A for identification.

MR. DECOULOS: Thank you very much.

If your Honor, please, just a few words on this. Today's jury pool consists of thirty-six people. My calculations of those thirty-six people, nine live in Lawrence, eleven live in Methuen, and seven live in North Andover. Then there are or there is one from the following cities and towns: Danvers, Hamilton, Groveland, Beverly, Middleton, Haverhill, Rowley, Lynn, and Lynnfield. That is the

composition of the jury pool of thirty-six people.

My motion, your Honor, has attached to it correspondence that I have had with the office of the jury commissioners in Cambridge. Although they have an office at North Washington Street, my impression is that they are at the Middlesex courthouse.

Attached to it, in addition to that correspondence that I have had with the Commissioner, the Jury Commissioner, in that correspondence he seems to think that because a juror has an extreme transportation problem, that that's enough for him and then the computer prints it

out. After they put that into the computer, the computer sends it out.

It is my contention, your Honor, that if a juror should take advantage -- and I am not saying that in a negative sort of way -- should take advantage of the fact that he doesn't have an automobile and because he lives in Lynn he can't get all the way up to Lawrence, because of the public transportation, when that comes up the Jury Commissioner should say we should get another person from Lynn to up to Lawrence.

The last sheet of my motion, your Honor, I received from the Essex County Planner a list of the cities and towns in Essex County, and there is thirty-four of

them. They gave the population as recently as 1989. I have added a fourth column to that showing the percentages of the cities and towns in relation to the whole hundred percent. Lawrence has ten percent of the population. Methuen has six percent and Andover has five percent. So, we have a twenty-one percent population of those three cities and towns in relation to the whole county. In today's jury pool we have a composition where twenty-seven percent or thirty-six percent, or of the thirty-six people, rather, representing the judicial district, those three cities and towns of the judicial district. That is, seventy-five percent of the jury is comprised of

three cities and towns where geographically to my last sheet there should be only twenty-one percent.

Now, just one last thing. And this holds true all the time, because if you read the Jury Commissioner's letter to me, the Jury Commissioner says, in four cities and towns, namely: Lawrence, Methuen, Andover and North Andover, and there is nobody in the pool today from North Andover. Seventy-six percent of the people that served in the Lawrence Superior Court came from those particular cities and towns.

So, statistically, if my argument stands up, your Honor, the Jury Commissioner said seventy-six percent, and

today I am here and it is seventy-five percent. So, we have a deviation of one percent.

I think what is happening is that jurors don't understand what an extreme transportation problem is or maybe they all do have an extreme transportation problem. It is my contention that if a juror has an extreme transportation problem and he informs the Commissioner of that fact, the Commissioner should say: Okay, let's take somebody from Lynn that doesn't have a transportation problem and send them to Lawrence. That is not happening.

As I say, there are different people coming from Lawrence, Methuen or

Marblehead or from Lynn. That's the demographic of it. I am sorry to say it, but it is true. I don't think that any client should wait as we have waited, your Honor, almost ten years to try this case. He filed this in late 1981 and we come up here and we are confronted with a very serious problem such as this.

Thank you very much, your Honor, for your kind attention.

THE COURT: Do any of the parties in this case wish to be heard on this issue?

MS. SALAMIDO: No, your Honor.

MR. BAUMAN: No, your Honor.

THE COURT: The system applied by the Jury Commissioners is computerized, they are randomized and the provisions permit

them to accommodate for hardships. There is no evidence before the Court that that has been abused or not founded. Therefore, your motion is denied.

MR. DECOULOS: Can I say just one more thing on that motion, your Honor?

THE COURT: You may.

MR. DECOULOS: It is almost impossible to prove unless we check with each juror that has been abused.

Thank you very much.

THE COURT: Anything else?

MR. DECOULOS: No. Thank you.

OFFICE OF THE JURY COMMISSIONER

98 North Washington Street
Boston, Massachusetts 02114
(617) 723-7433
Jury Commissioner - Paul J. Carr

March 20, 1992

Nicholas J. Decoulos, Esquire
Decoulos & Decoulos
248 Andover Street at Willowdale Lane
Peabody, Massachusetts 01960

Dear Attorney Decoulos:

Judge Mulligan has asked me to respond to your correspondence to him dated March 9, 1992, in which you ask if "there is any hope for the weary" concerning the matter of demographic representation at the Lawrence Superior Courthouse. I am pleased to report that we have just about turned the corner on this matter.

As you know, this office has totally restructured its manner of dealing with requests for courthouse transfers on a

statewide basis. The following procedures are now firmly in place:

1. No more than 25% of the jurors required at each court location are allowed to transfer to that location from the one to which they were originally summoned.

2. The juror confirmation form has been redesigned so as to further allow us to limit transfers. (A sample form is enclosed).

3. All confirmation forms received at this office are scrutinized to assure that transfer requests are legitimately processed. Those deemed to be not allowable are refused and the juror is so notified. (A sample notification is also enclosed.)

4. Our telephone staff has been instructed to deal fairly, but firmly, with those requesting transfers.

As you know, step number "1" above was initiated in December, 1991, However, the remaining three steps were only placed into operation at the beginning of February 1992, when, with the new summons package, we began summoning jurors to appear for the April, 1992, jury sessions.

Because of this, I expect to see positive changes in this area with the April jury sessions.

It is my belief that all of the above-mentioned endeavors implemented over the past couple of months will cause jury pools to be more geographically representative.

If you have any questions concerning this matter, please do not hesitate to call me at (617) 723-7433 and I will be more than happy to answer them for you.

Sincerely,

Paul J. Carr
Jury Commissioner

/epr

cc: Justice Robert A. Mulligan
Jury Management Advisory Committee
File

JUROR CONFIRMATION FORM (This POSTCARD must be completed and returned within 10 days of its receipt) Please review the juror qualifications on the preceding page and then answer A or B below by placing an X in the appropriate box.

A	I am qualified to serve as a juror.	**B**	I am **not qualified** to serve as a juror. The number of the reason from the preceding page that applies to me is X'd here.

C If you claim a disqualification, explain briefly here in section "C". However, if you claim reason 9 or 10, you must obtain a letter from your physician or Christian Science practitioner and then mail the letter and this form to the address indicated on the reverse side of this card in a separate envelope.

D PEABODY LAWRENCE NWBPORT SALEM-S

I request to change my location to the court listed above by X'ing the appropriate box to the left of the court, because I have a hardship I have explained in "F" below. If no court is named above, then this option does not apply.

E I am qualified as a juror, but I wish to postpone to another time, for up to,

but not more than one year. Insert the new date as Month, Day, Year. For example May 1, 1993 is written as 050193. Please write your numbers like this 1 2 3 4 5 6 7 8 9 0

F

Explanation of hardship in support of request for court location change.

G

I certify under penalty of perjury that the information provided herein is true and complete to the best of my knowledge.

Date Signature of Juror or Person Authorized to sign

PRESORTED
FIRST CLASS MAIL
US POSTAGE PAID
BOSTON, MA
PERMIT NO. 55884

FROM ADDRESS
OFFICE OF JURY COMMISSIONER
98 NORTH WASHINGTON STREET
BOSTON, MASSACHUSETTS
02114

INVALID TRANSFER NOTICE * 03/09/92

PLEASE BE ADVISED THAT YOUR REQUEST TO CHANGE YOUR COURT LOCATION HAS BEEN DENIED. YOUR REQUEST WAS DEEMED NOT BE A HARDSHIP BASED UPON THE REASON GIVEN BY YOU ON THE JUROR CONFIRMATION FORM.
THEREFORE, YOU ARE EXPECTED TO APPEAR TO PERFORM YOUR JUROR SERVICE AT THE LOCATION, DATE AND TIME LISTED BELOW. IF YOU WISH TO DISCUSS THIS MATTER FURTHER, PLEASE CALL 1-800-843-5879 AFTER 9:00 A.M.

RESPECTFULLY,
JURY COMMISSIONER

ON: APRIL 28, 1982 8:00 A.M.
AT: LOWELL SUPERIOR COURT
PHONE:1-800-THE-JURY
360 GORHAM STREET
LOWELL

MAIL TO ADDRESS
JANET MEGERDICHIAN
52 CLINTON ST. APT #2
CAMBRIDGE, MA 02138

COMMONWEALTH OF MASSACHUSETTS

Appeals Court for the Commonwealth

At Boston, October 26, 1994

IN THE CASE OF

JOSEPH DISTEFANO, trustee

vs.

COMMISSIONERS OF ESSEX COUNTY & OTHERS.

pending in the SUPERIOR Court for the County of Essex

ORDERED, that the following entry be made in the docket; viz.,--

Judgment affirmed.

Order denying motion for a new trial affirmed.

By The Court,

Nancy J. Foley, Clerk

October 26, 1994.

92-P-1660 Appeals Court

JOSEPH DiSTEFANO, trustee, vs.
COMMISSIONERS OF ESSEX
COUNTY & others.

No. 92-P-1660. October 26, 1994

Jury and Jurors. Constitutional Law, Jury. Evidence, Expert opinion.

1. Although G..L. c. 234A calls, in §3, as inserted by St. 1981, c. 298, § 1, for juries to "be selected at random from the population o the judicial district (normally a county) in which they reside," § 21, as inserted by St. 1982, c. 298, § 1, specifically requires the jury commissioner to include on the juror confirmation form "a place where the juror may make or acknowledge a declaration that hardship would be imposed upon him if he were required to serve at the court location to which he was summoned [and to] . . . designate a more convenient jury-trial location within the judicial district." The result of that privilege, in practice, was to skew the Lawrence jury pool in this case geographically, so that twenty-seven of the thirty-six jurors were residents of four communities (Andover, Lawrence, Methuen, North Andover) that together contain only twenty-four percent of the population of Essex County. This

did not violate the statute, nor did not violate art. 12 of the Declaration of Rights of the Massachusetts Constitution, where there was neither a suggestion of intentional discrimination, Commonwealth v. Bastarache, 382 Mass. 86, 100 (1980), nor a suggestion that a jury chosen at random from the four overrepresented communities would differ in background or outlook from a jury chosen at random from all of Essex County. Moreover, residents of Essex County not from the four communities, were, in fact, represented in considerable numbers in the jury pool, ibid, and the record shows the four overrepresented communities to have had, in 1989, in the aggregate, more than twice the population of all of Franklin County at the time of the Bastarche decision.

2. Apart from the expected expert (Taubert) testimony that did not materialize, there was other evidence, such as the testimony of the then county engineer and the expert Finegan's own observations, supplying a basis for the assumption of the Finegan opinion that the downstream pipes were flowing full in the January, 1979, floods. In any event, the plaintiff did not move to strike the Finegan opinion, see Peterson, petitioner, 354 Mass. 110, 115 (1968).

3. The judge could believe the affidavit of Attorney Salamido over that of Taubert. There was no error in denying the motion for a new trial.

Judgment affirmed. Order denying motion for a new trial affirmed.

Nicholas J. Decoulos for the plaintiff.
Daniel R. Deutsch for the defendants.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Nicholas J. Decoulos, Esquire
Decoulos & Decoulos
248 Andover Street
Peabody, MA 01960

RE: Docket No. FAR-07539

JOSEPH DiSTEFANO, trustee,
vs.
COMMISSIONERS OF ESSEX COUNTY & others

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on January 3, 1995, the above-captioned Application for Further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: January 4, 1995

To: Nicholas J. Decoulos, Esquire
Daniel R. Deutsch, Esquire
Rudolph Bedar

Supreme Court, U.S.
FILED
APR 28 1995
OFFICE OF THE CLERK

No. 94-1617

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH DiSTEFANO, TRUSTEE,
PETITIONER,

v.

KATHERINE DONOVAN, EDWARD H. CAHILL, AND JOHN W. MCKEAN, COMMISSIONERS OF ESSEX COUNTY, MASSACHUSETTS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this court exercise its power to review the final judgment of the Massachusetts Appeals Court under 28 U.S.C., § 1257(a), where no federal question was ever raised in or passed upon by the Massachusetts state courts?

2. Should this court grant the Petition insofar as it challenges the composition of the jury in petitioner's civil lawsuit in Massachusetts state court on the grounds that certain towns and cities within the subject county were over-represented in light of their respective percentages of the county's population, where petitioner can show no systematic or intentional exclusion and can establish no special or distinct characteristics of persons from the over-represented or under-represented cities and towns, and where the Appeals Court's decision is entirely consistent with decisions of this court and of the other federal and state courts?

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In the
Supreme Court of the United States

OCTOBER TERM, 1994

94-1617

JOSEPH DiSTEFANO, TRUSTEE,
PETITIONER,

v.

KATHERINE DONOVAN, EDWARD H. CAHILL, AND JOHN W. MCKEAN, COMMISSIONERS OF ESSEX COUNTY, MASSACHUSETTS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The basis for this Court's jurisdiction asserted by petitioner is 28 U.S.C., § 1257(a), which authorizes review of a final judgment rendered by the highest court of a state in which a decision could be had, where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the United States Constitution, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution. Respondents challenge this assertion of jurisdiction because the federal question on which the Petition

now rests was never raised or pressed at any stage of the proceedings in the Massachusetts state courts, and was never passed upon by those courts.

STATEMENT OF THE CASE

Generally, respondents the Commissioners of Essex County are content with petitioner DiStefano's Statement of the Case, with the exception of his assertion that prospective jurors' "frequent exercise" of the option to designate jury service at a courthouse closer to their residences by certifying an "extreme transportation problem" resulted in a systematic geographical misrepresentation in the juror pool [Petition 10]. In fact, the only evidence presented by DiStefano was that this "misrepresentation" occurred for the first three months of 1990 and in the juror pool at the trial of his claim [Petition App. 19, 27].[1]

In addition, the Commissioners supplement DiStefano's Statement of the Case as follows. The claim set forth in DiStefano's Complaint alleges nuisance and trespass on land under Massachusetts common law [Petition App. 6-7]. Of the thirty-six prospective jurors in the pool for his trial, nine lived in Lawrence, Massachusetts; eleven lived in Methuen; seven lived in North Andover[2]; and one lived in each of Danvers, Hamilton, Groveland, Beverly, Middleton, Haverhill, Rowley, Lynn, and Lynnfield [Petition App. 27][3]. Of the fourteen jurors actually seated, seven lived in a combination of Lawrence, Methuen, North Andover, and Andover, with

[1] References to the Appendix to the Petition are designated as "Petition App. ____". References to the Record Appendix filed in the Massachusetts Appeals Court are designated as "A. ____".

[2] Given that one of the jurors actually seated lived in Andover [A. 49], DiStefano's counsel may have intended to include him in the group attributed to North Andover.

[3] No juror seated was from Hamilton, while one juror actually seated lived in Amesbury [A. 43-56]. Accordingly, DiStefano's counsel may have mistaken Hamilton for Amesbury in his assertion to the trial court [Petition App. 27].

the remainder distributed equally among Amesbury, Lynnfield, Middleton, Rowley, Lynn, Groveland, and Beverly [A. 43-56]. The four communities allegedly over-represented (Lawrence, Methuen, Andover, and North Andover) were, respectively, the second, seventh, ninth, and thirteenth most populous communities in the county as of 1989 [Petition App. 21-22]. DiStefano has at no stage of the proceedings presented any evidence that persons living in these communities share any distinct racial, religious, ethnic, social, or economic characteristics. Of the fourteen jurors actually seated, there were six males and eight females [A. 43-56]. Twelve were married and two were divorced [*Id.*]. The jurors' ages were distributed as follows: two were between 18 and 30; five were between 30 and 40; four were between 40 and 50; one was between 50 and 60; one was older than 60; and one did not list age [*Id.*]. Three jurors had attended or completed high school; eight had attended or completed college; two had earned postgraduate degrees; and one did not indicate educational level [*Id.*]. The jurors' occupations included senior warehouser; construction manager; secretary; medical secretary; nursing assistant; meat cutter; consulting engineer; computer operator; "self employed"; "community relations"; accountant; appointment secretary; accounting supervisor; and personnel director [*Id.*]. Six were employed in the "over-represented" communities, while eight were employed elsewhere [*Id.*].

Finally, DiStefano's Statement of the Case fails to include the information required by Supreme Court Rule 14.1(h). In fact, he did not raise at any stage of the proceedings in the Massachusetts Superior Court, Appeals Court, or Supreme Judicial Court the federal question sought to be reviewed [Petition App. 1-46]. Instead, that question has been raised for the first time in his Petition [Petition i, 21-22].

REASONS FOR DENYING THE WRIT

I. Petitioner Has Never Raised Or Pressed A Federal Question At Any Stage Of The Proceedings In The State Courts, Nor Have Those Courts Had The Opportunity To Pass On Any Such Question.

This Court should not reach the merits of the Petition because DiStefano has never raised nor pressed in the Massachusetts state courts the federal question to which his Petition now alludes. Since he seeks relief from a decision of the Massachusetts Appeals Court, jurisdiction of this Court is premised on 28 U.S.C., § 1257(a), as amended by Pub. L. 100-352, § 3, 102 Stat. 662. Section 1257(a) provides, in pertinent part, that a

> "[f]inal judgment[] rendered by the highest court of a State in which a decision could be had, may be reviewed ... by writ of certiorari ... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, ..., the United States."[4,5]

[4] The first clause of §1257(a) is irrelevant, since neither the Petition nor the record give any indication that the "validity of a treaty or statute of the United States" has been "drawn in question."

[5] Although the Massachusetts Appeals Court is not the court of last resort in Massachusetts, *see* M.G.L. c. 211A, §§ 1, 10, DiStefano's application for further appellate review was denied by the Massachusetts Supreme Judicial Court [Petition App. 46]. The Commissioners therefore have assumed that there is a final judgment by the "highest court of [Massachusetts] in which a decision could be had." *See, e.g., Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 678 n. 1 (1968); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 160 (1954).

The only federal Constitutional or statutory provision referred to in the Petition is the Seventh Amendment to the United States Constitution [Petition i, 21-22]. Accordingly, the only conceivable bases for § 1257(a) jurisdiction are (1) an argument that the Massachusetts statute governing juror selection, M.G.L. c. 234A, §§1, *et seq.*, is repugnant to the Seventh Amendment, or (2) an argument that DiStefano specially set up or claimed a title, right, privilege, or immunity under the Seventh Amendment. The record, however, is devoid of any indication that either of these arguments was even raised in the state courts, let alone pressed. DiStefano's Complaint makes no reference to the Seventh Amendment [Petition App. 1-8]. Likewise, DiStefano's Motion and Affidavit to Challenge Composition of Juror Pool, filed in the Massachusetts Superior Court, fails to mention the Seventh Amendment, and is by its terms confined to a claim under the Massachusetts statute [Petition App. 9-12]. The arguments reflected by the transcript of proceedings in the Superior Court on DiStefano's motion are similarly cabined [Petition App. 25-34]. Finally, there is nothing in the Appeals Court's opinion which refers to the Seventh Amendment, and that court limited its decision to consideration of the Massachusetts statute and a Massachusetts constitutional provision regarding jury trials [Petition App. 43-44].[6] At no stage of the proceedings in the state courts was any other federal provision articulated [Petition App. 1-46]. Instead, initial mention of the Seventh Amendment appears in the Petition, and then

[6] Where the state court "has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969). The Petition makes no such showing. Moreover, the Petition violates the requirements of Supreme Court Rule 14.1(h), which mandates that a petition seeking § 1257 review "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them . . . ; and [such specific references to the record] as will show that the federal question was timely and properly raised . . . ".

only in the sections entitled "Constitutional Provision and Statutes" and"Conclusion" [Petition i, 21-22].

On occasion, this Court has indicated that it is "without jurisdiction" under § 1257 to review the judgment of a state court where the federal question "was not raised below". *Webb* v. *Webb*, 451 U.S. 493, 495 (1981) (construing § 1257 prior to its amendment in 1988). At other times, the Court has suggested that this rule is not jurisdictional, but is, rather, a "prudential restriction that does not pose an insuperable bar to [this Court's] review." *Bankers Life and Casualty Company* v. *Crenshaw*, 486 U.S. 71, 79 (1988) [citing *Illinois* v. *Gates*, 462 U.S. 213, 218-19 (1983)]. Even if merely a "prudential" rule rather than an absolute jurisdictional block, however, the doctrine "creates, at the least, a weighty presumption against review", *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985), which has been ignored only in "very rare exceptions", *Yee* v. *City of Escondido, California*, 503 U.S. 519, 112 S.Ct. 1522, 1531 (1992).

Assuming that DiStefano's failure to raise his federal question in the state courts is not jurisdictional, this Court should refuse his invitation for review. Foremost among the reasons supporting refusal are principles of comity in the federal-state system which "require that the state courts be afforded the opportunity to perform their duty, ..." *Webb*, 451 U.S. at 499. Practical considerations lead to the same result. The parties are thereby given the chance to "develop the record necessary for adjudicating the issue"; the state courts are permitted "to exercise their authority"; and the federal claims at issue "will be adjudicated in the state courts where necessary to dispose of the case." *Webb*, 451 U.S. at 500-01. Review of DiStefano's tardily-raised Seventh Amendment claim would "short-circuit a number of less intrusive, and possibly more appropriate, resolutions", such as revision of the Massachusetts statute by the State Legislature or the generation of a "well-developed record and a reasoned opinion on the merits" by the Massachusetts courts. *Bankers Life and Casualty Company*, 486 U.S.at 79-80. As it has repeatedly

done in similar cases, this Court should decline to review the Appeals Court's decision on the grounds that DiStefano's federal claim was not timely or properly raised. *Heath*, 474 U.S. at 87; *Bankers Life and Casualty Company*, 486 U.S. at 80; *Yee*, 112 S.Ct. at 1531.[7]

II. The Writ Should Be Denied Because The State Court's Decision Is Completely Consistent With Decisions By This Court And Other Federal And State Courts, And Petitioner's Case Presents No Appropriate Occasion For A Change In The Law.

Even if this Court generously opts to consider DiStefano's untimely Seventh Amendment challenge, the granting of the writ would be improvident. In an unbroken, uniform line of longstanding precedent, this Court and other courts in various federal and state jurisdictions have held that the Seventh Amendment's guarantees do not apply to civil trials in the state courts. *See Pearson* v. *Yewdall*, 95 U.S. 294, 296 (1877); *Curtis* v. *Loether*, 415 U.S. 189, 192 n. 6 (1974); *Oleson* v. *Trust Co. of Chicago*, 245 F.2d 522, 524 (CA 7 1957) *cert. denied* 355 U.S. 896 (1957); *O'Connor* v. *State of Nevada*, 507 F.Supp. 546, 548 (D.Nev. 1981), *aff'd* 686 F.2d 749 (CA 9 1982) *cert. denied* 459 U.S.1071 (1982); *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220, 223 n. 4, 636 N.E.2d 212, 215 n. 4 (1994); *Galvin* v. *Welsh Manufacturing Co.*, 382 Mass. 340, 345, 416 N.E.2d 183, 186 (1981); *Digital & Analog Design Corp.* v. *North Supply Co.*, 590 N.E.2d 737, 742 (Ohio

[7] In support of his belated effort to commence a Seventh Amendment attack on the Appeals Court's opinion, DiStefano cites *United States* v. *Young*, 822 F.2d 1234, 1239 (CA 2, 1987) for the principle that "[i]t is never too late to raise a constitutional challenge to the makeup of the juror pool." [Petition 19]. The *Young* court in fact only considered an untimely argument hypothetically. *Id.* More important, the Court of Appeals' decision in *Young* was wholly unconcerned with the "not pressed or passed upon below" rule governing *this* Court's authority to review the final judgments of state courts of last resort, and is simply inapposite.

1992). DiStefano cites no case to the contrary.

Moreover, DiStefano cites no case holding that, under the Seventh Amendment or under any conceivable analogues (*e.g.*, the federal Jury Selection Act, 28 U.S.C., §§ 1861, *et seq.*, and the Sixth Amendment to the United States Constitution), there is a right to proportional geographic representation such as he urges here. This Court "has never gone so far as to hold that the constitution requires venires to be, statistically, a substantially true mirror of the community." *Barber* v. *Ponte*, 772 F.2d 982, 997 (CA 1 1985) (en banc) *cert. denied* 475 U.S. 1050 (1986) [citations omitted]. "Strict statistical analysis has been used only in situations where *special* groups that have been discriminated against are involved". *Id.* at 998 [citing *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979)] [emphasis in original]. In this context, "[t]he essence of a distinctive group is that its members share specific common characteristics." *Id.* Therefore, this Court has squarely held that, in order to establish a violation of the "fair-cross-sectional requirement" of the Sixth Amendment, even a defendant in a criminal case must establish, *inter alia*, that "the group alleged to be excluded is a 'distinctive' group in the community" and that there has been "systematic exclusion of the group in the jury selection process". *Duren*, 439 U.S. at 364. Accordingly, this Court's jury representativeness cases, "whether based on the fair-cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment, have involved such groups as blacks, ...; women, ...; and Mexican-Americans, ..." [citations omitted], and have turned at least in part on the " 'appearance of unfairness' " resulting from juror exclusion "on the basis of some immutable characteristic such as race, gender, or ethnic background". *Lockhart* v. *McCree*, 476 U.S. 162, 175 (1986). *Cf. Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220-24 (1946) ("systematic and intentional exclusion" of "all persons who work for a daily wage" constituted discrimination against identifiable group which was at odds with "American tradi-

tion of trial by jury", at least in context of federal Jury Selection Act).

Even assuming that the Seventh Amendment applies to DiStefano's lawsuit and that the foregoing rules would control analysis under that Amendment, his claim is wholly without support. First, as the Appeals Court noted, there has been no "suggestion of intentional discrimination". [Petition App. 44], or systematic exclusion by respondents of jurors from towns within Essex County other than the four towns which DiStefano asserts were disproportionately represented on his jury. Instead, it is undisputed that the putative "under-representation" occurred solely as a result of random responses by prospective jurors to the question whether travel to the courthouse would constitute an "extreme transportation problem". [Petition App. 26-34]. Second, as the Appeals Court also concluded, DiStefano has made absolutely no showing "that a jury chosen at random from the four overrepresented communities would differ in background or outlook from a jury chosen at random from all of Essex County." [Petition App. 44]. *Cf. United States* v. *Butera*, 420 F.2d 564, 572 (CA 1 1970) *overruled on other grounds by Barber*, 772 F.2d at 996 ("... we cannot see that the views and attitudes of voters of one city or town are in any way 'distinct' from those of voters in a neighboring community.") In fact, the composition of the jury which was actually seated for the trial of DiStefano's claim exhibited remarkable diversity of age, gender, educational background, and occupation. [A. 43-56]. DiStefano has advanced no evidence that there are any distinct racial, ethnic, social, or economic characteristics peculiar to residents of the four allegedly "over-represented" communities. [Petition App. 9-22, 26-40].

DiStefano therefore has failed to demonstrate a conflict between (1) the Appeals Court's decision and (2) any decisions by this Court, by other federal courts, or by other state courts construing the Seventh Amendment or any of its analogues. Nor has he articulated the existence in this case of a substantial and unsettled question of federal law.

Finally, even if this Court were disposed to extend the Seventh Amendment in a manner unforeseeable in light of existing precedent, the case at bar presents a highly inappropriate vehicle. DiStefano's lawsuit raises a garden variety claim of nuisance and trespass on land under Massachusetts common law. *See Sheppard Envelope Co.* v. *Arcade Malleable Iron Co.*, 335 Mass.180, 187 (1956). He has established nothing about the purported geographic under-representation on his jury of residents of Essex County which indicates that a distinct and identifiable group of persons has been systematically and intentionally excluded in a manner suggesting unfairness. No need exists for this Court to intercede on DiStefano's behalf with respect to his jury trial rights, because Massachusetts courts have zealously safeguarded the right under state law to be free from "a substantial, identified exclusion of any distinct, qualified segment of society from jury lists, whether or not the exclusion was intentional." *Commonwealth* v. *Bastarache*, 382 Mass. 86, 102, 414 N.E.2d 984, 994-95 (1980). The Petition is nothing more than a thinly-disguised attempt to have this Court decide a question which properly is resolved purely under Massachusetts state law, and the writ should be denied.

CONCLUSION

For the reasons set forth herein, the writ of certiorari should be denied.

Respectfully submitted,

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